Supreme Court, U.S.
FILED

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No. _____

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

_____

Connie Brown Derbigny
Petitioner.

v.

Dan Glickman, Secretary, Department of Agriculture
Respondent.

_____

ON PETITION FOR A WRIT OF CERTIORARI TO THE
FIFTH CIRCUIT COURT OF APPEALS

_____

PETITION FOR WRIT OF CERTIORARI

LA QUETTA M. GOLDEN
Counsel of Record
2320 14TH ST., SUITE 206
GULFPORT, MS 39501
(228) 863-3152

Attorney for Petitioner

28 pp

QUESTIONS PRESENTED

Issue one:

Whether petitioner was discriminated against based upon her race and retaliation when respondent violated petitioner's federal civil rights when respondent terminated her employment and when there existed genuine issues of material fact and law.

Issue two:

Whether the lower courts erred in granting respondent's motion for summary judgment for petitioner's alleged failure to exhaust administrative remedies when petitioner had timely filed her complaint, when respondents waived its opportunity to argue that her claim was time-barred and when petitioner relied upon the Doctrine of Equitable Tolling and Equitable Estoppel?

PARTIES IN THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

CONNIE BROWN DERBIGNY
PETITIONER

VERSUS

DAN GLICKMAN, SECRETARY,
DEPARTMENT OF AGRICULTURE
RESPONDENTS

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42 U.S.C. Section 2000e
42 U.S.C. Section 1981

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Fifth Circuit Court of Appeals in this matter filed on December 31, 1997.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix 101 to the petition and is unpublished.

The opinion of the United States district court appears at Appendix 106 to the petition and is unpublished.

The opinion of the U.S. Equal Employment Opportunity Commission appears in part at Appendix 108 to the petition and is unpublished.

JURISDICTION

The United States Court of Appeals filed its judgment on December 31, 1997. App. 101. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in the case at bar include violations by Respondent against Title VII of the 1964 Civil Rights Acts (42 U.S. C. 2000 e) on the issues of racial and retaliatory discrimination.

STATEMENT

Your Petitioner timely initiated an appeal to the Equal Employment Opportunity Commission (EEOC) from the final agency decision concerning her equal employment opportunity (EEO) complaint, which alleged discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. section 200 e et seq. The appeal was accepted by the Commission in accordance with the provisions of EEOC Order No. 960.001.

Your Petitioner timely filed a Complaint of racial discrimination and reprisal against respondents on March 22, 1996. Thereafter, respondents filed a Motion to Dismiss or in the alternative Motion for Summary Judgment alleging petitioner's failure to exhaust her administrative remedies. Then on March 31, 1997, the lower court judge dismissed petitioner's complaint with prejudice. Petitioner timely filed her appeal to the Fifth Circuit Court of Appeals in New Orleans, Louisiana.

The facts indicate that your Petitioner began working for Respondent in March, 1987, in a temporary capacity, at the GS-03 level; thereafter, she became a permanent employee and was promoted tot he GS-05 level. In August 1989, Petitioner resigned from her position to further her education.

In March 1990, Petitioner resumed her employment with Respondent as a Physical Science Technician (Temporary), GS-05, and she occupied this position until the date of her unlawful termination.

During her entire tenure with Respondent, Petitioner has always performed her duties and job responsibilities in a timely, professional and efficient manner.

Prior to the initial reprisal activity, Petitioner had always enjoyed a positive rapport with her colleagues and supervisors.

Then, prior to December 1990, Petitioner's sister, Debora Brown

Ladner, an African-American female, became engaged to Darren Ladner, a Caucasian male, both were also employed by Respondent.

Thereafter, Dorothy L. Ladner, who was the supervisor of both Petitioner and her sister, and who is related to Mr. Ladner, expressed her displeasure with interracial relationships.

In December, 1990, the above named supervisor terminated the employment of Petitioner's sister. It was during this critical period that Petitioner began experiencing a pattern of disparate treatment from her supervisor. Such treatment included rating Petitioner at a lower scale on her evaluation when she previously advised Petitioner that her performance was outstanding; that the supervisor began demanding that Petitioner meet her deadlines by one-hundred percent; the supervisor forbade Petitioner to keep records when she had previously been allowed to maintain them; the supervisor gave Petitioner unreasonable deadlines to complete her assigned tasks; when Petitioner took her lab notebooks with her upon termination, the agency called the Federal Bureau of Investigation and filed a complaint against Petitioner, but Caucasian employees who customarily and routinely took lab notebooks were never harassed and investigated by the FBI through the direction of Respondent; the supervisor failed to render Petitioner assistance when requested; the supervisor placed Petitioner on "AWOL" status in October, 1990 unnecessarily; Petitioner could no longer attend her classes to further her education; Petitioner was instructed not to utlize the office copier machine; documents were falsified concerning Petitioner's work and job performance; Petitioner's wages were illegally withheld for a period in excess of one year; and Petitioner was unjustly terminated from her employment in February 1991.

Petitioner strongly asserts that Respondent discriminated against her on the basis of her race and reprisal based upon the aforementioned acts of her Caucasian supervisor, Dorothy Ladner.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUITS

Petitioner respectfully requests this Honorable Court to grant this petition for a writ of certiorari because the ruling of the 5th Circuit Court of Appeals is in direct conflict with decisions of other circuits.

The 5th Circuit Court of Appeals and the United States district courts' dismissed Petitioner's racial discrimination claim when Petitioner had properly met her burden of proof as established by the *Josey v. Hollingsworth* 996 F. 2d 632 (3rd Cir. 1993) and *McDonnell Douglas v. Green* 41 U.S. 792, 802 (1973) cases. Furthermore, *Josey* cited the Supreme Court in rendering its conclusion that Plaintiff in *Josey* had been discriminated based upon his race.

It is of national importance for the high court to render its opinion of the issues of race discrimination and discrimination based upon reprisal pursuant to Title VII of the 1964 Civil Rights Act. Petitioner brings this action for other females in this nation and in Gulfport, Mississippi who were terminated based upon their race and/or reprisal.

Petitioner strongly asserts that Respondents failed to diversify their work force. Since Petitioner's wrongful termination, Respondents have allowed a Caucasian supervisor to terminate qualified African-Americans within its work force. This is a very important issue since the city of Gulfport, Mississippi has within it area at least 12 percent African-American within its city; yet, African-Americans employees have been terminated at an alarming rate.

A. SUMMARY JUDGMENT REVIEW

When Respondents filed their Motion for Summary Judgment, it was premised upon allegations that Petitioner failed to establish subject matter jurisdiction as well as Petitioner's failure to exhaust administrative remedies (See Record, Part I, pg. 90) The lower court overruled

Respondents' lack of subject matter jurisdiction claim, but dismissed Petitioner's suit for her failure to exhaust administrative remedies; and due to her failure to establish her claims. (See Record, pg. 123)

Federal Rule Civil Procedure 56 specifically states as follows:

> (a) A party seeking to recover upon a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

In the case at bar, Petitioner submitted a statement of facts, an affidavit signed by Petitioner and an affidavit from Ms. Norma Turner concerning Petitioner's supervisor's attitude against racially mixed couples and the hostile treatment she received during her tenure with Respondent. (See Record, pg. 91).

In *Little v. Liquid Air Corp.*, 37 F. 3d 1069 (C.A. 5th Miss 1994), the Court of Appeals for the Fifth Circuit rendered an extensive discussion of the standard of review for summary judgments. In *Little*, the court held that factual controversies are resolved in favor of the party opposing motion for summary judgment, but only when there is actual controversy, i.e., when both parties have submitted evidence of contradictory facts. Also see, *Gann v. Fruehaul Corp.*, 52 F 3d 1320 (C.A. 5 Miss 1995), *James v. Sadler*, 909 F. 2d 834 (C.A. 5 Miss, 1990); *Thompson v. City of Starkville*, Miss, 901 F.2d 456 (C.A. 5 Miss 1990); *Stewart v Stevenson Services, Inc.* 980 F. Supp. 552 (N.D. Miss 1995); *Oswalt v Sara Lee Corp.*, 889 F. Supp. 253 (N.D. Miss 1995); *Franks v Magnolia Hosp.*, 888 F. Supp. 1310 (N.D. Miss 1995); and *Boyd v Continental Baking Cor.*, 887 F. Supp. 13 (N.D. Miss 1995).

In the case at bar, Respondent alleged in his Motion for Summary Judgment that Petitioner failed to establish her claims. However, Petitioner submitted affidavits in rebuttal to Respondent's motion. The contradictory fact of whether Ms. Dorothy Ladner disliked mixed couples and the effect

that this had on Petitioner should be determined by a trier of fact and not a judge.

Therefore, Petitioner respectfully requests that this Honorable Court grants this petition, reverse and remand this cause to the lower court and allow Petitioner to proceed to trial.

B. RACIAL DISCRIMINATION

The United States District Court for the Southern District of Mississippi improperly denied Petitioner's claim of racial discrimination pursuant to Title VII of the 1964 Civil Rights Acts.

Jurisdiction is vested in federal courts pursuant to Title VII. Congress' purpose in adopting Title VII was to "assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnel Douglas Corp. V Green*, 411 U.S. 792, 800 (1973). In *Kizer v. Children's Learning Ctr.*, 962 F. 2d 608, 611 (7th Cir. 1992), the court held that Title VII . . . makes it unlawful for any employer "to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals' . . . face." 42 U.S.C. Sections 2000e-2(a)(1).

Petitioner asserts that she has established by a preponderance of evidence her prima facie case under Title VII. See *Cooper v Federal Reserve Bank*, 467 U.S. 867 (1984). Petitioner also maintains that she has met the standards as set forth in *McDonnel Douglas*.

Your Petitioner has further maintained that she was qualified to perform her tasks; that she was minority and she was treated more harshly than her Caucasian co-workers when she was discharged from her employment for pretextual reasons. Respondent stated that Petitioner was insubordinate and based upon this reason, Petitioner was terminated. However, Petitioner presented a sworn affidavit refuting her employer's claim of insubordination. Therefore, the employer's proffered explanation

is unworthy of any credence.

In the *United States Postal Serv. Bd. Of Governors v. Aikens*, 460 U.S. 711, 716 (1983), the court held that rarely will there be "eyewitness" testimony with regard to the employer's mental processes. Therefore, if an employee doesn't have direct evidence, he may use circumstantial evidence. However, in the case at bar, Petitioner had direct evidence that her supervisor, Ms. Ladner, did not like interracial couple relationships and as a result, Petitioner was terminated based upon her association with her sister and her sister's Caucasian male companion. Consequently, Petitioner and her sister were dismissed from the agency. Petitioner strongly asserts that the two dismissals warrant a review of circumstantial evidence of racial discrimination. Prior to Ms. Ladner becoming Petitioner's supervisor, your Petitioner was able to enjoy her work without fear of any reprisal. Yet, immediately upon Ms. Ladner's discovery of Petitioner's sister and the sister's relationship with a Caucasian male, both sisters were terminated.

Therefore, based upon the submitted affidavits, direct and circumstantial evidence presented, Petitioner asserts that the issue of race discrimination should proceed to a trial by jury.

In Josey v. Hollingworth, 996 F. 2d 632 (3rd Cir. 1993), the Court held that to make a prima facie showing of racial discrimination, Plaintiff must demonstrate that (1) he belongs to a racial minority; (2) he was qualified for the position; (3) he was discharged; and (4) other employees not in a protected class were treated more favorably. In the case at bar, Petitioner has met this burden.

In *Josey*, the court further stated that the Supreme Court has acknowledged that "there will seldom be eyewitness testimony as to the employer's mental processes. "Where direct 'smoking gun' evidence of discrimination is unavailable, this court has found that the proper iniquity is "whether evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge reasonable could support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence necessarily leads to [the] conclusion that the employer

did act for discriminatory reasons," (See *Graham v. F. B. Leopold Co.*, 779 F. 2d 170, 173 (3rd Cir. 1985)

The court further held that it has found that factors such as the defendant's credibility, the timing of an employee's dismissal, and the employer's treatment of the employee could raise an inference of pretext which would make summary judgment for the employer inappropriate.

In the case at bar, Respondent terminated Petitioner for alleged insubordination is contrary to Petitioner's job evaluations. The timing of Petitioner termination along with the inconsistency could raise an inference of pretext which could make summary judgment for the Respondent inappropriate. Petitioner seeks a reversal since the ruling of the lower courts are inconsistent with prior Supreme Court ruling and applicable federal statutes.

C. RETALIATION

Petitioner has also maintained that she has proven her claim of retaliation. In order to prove retaliatory discharge, one must establish that she engaged in a protected activity, that an adverse employment action occurred, and that a causal connection between the two existed. See *McMillan v Rust College, Inc.*, 710 F. 2d 1112 (5th Cir. 1983).

In the case at bar, Petitioner filed previous EEOC Complaints. Subsequent to Petitioner engaging in these protected activities, she was discharged on the guise of "insubordination." Prior to Petitioner filing any complaints, she was able to work in a hostile free environment. Not until her sister's relationship with a Caucasian male and the previous filing of a EEOC Complaint was Petitioner considered disgruntled or insubordinate to her superiors.

In *Ashagre v. Southland Corp.*, 546 F. Supp. 1214, 1218 (S.D. Tex. (1982), the court held that some showing of satisfactory job performance is necessary to raise the inference of discrimination. Plaintiff-Appellant maintains that her job evaluations were satisfactory as evidence by the record. (See Record, Part I).

With respect to the issue of whether Petitioner called her supervisor a liar is a factual determination that should be decided upon by a jury and not a judge. However, as stated in her sworn affidavit, Petitioner stated that she never called her former supervisor a liar. This bold assertion by the supervisor is simply another attempt to justify Petitioner's unlawful termination because there's no other legitimate reason for terminating Petitioner.

Therefore, based upon the foregoing, Petitioner respectfully requests this Honorable Court to reverse the lower courts' ruling since she has established direct and circumstantial evidence concerning racial discrimination and retaliatory discharge in the case at bar. Petitioner further requests these issues be allowed to proceed to trial by jury.

D. DOCTRINES OF EQUITABLE TOLLING AND ESTOPPEL

In the March, 1997 ruling, the lower court held that it is well-established that a plaintiff must exhaust administrative remedies before filing an EEOC complaint or instituting a Title VII lawsuit. See *Wilson v. Secretary, Dept. Of Veterans Affairs on Behalf of Veterans Canteen Servs.*, 65 F. 3d 402 (5th Cir. 1995); *National Ass'n of Government Employees v City of Public Service Bd. Of San Antonio, Tex..*, 40 F. 3d 698, 711 (th Cir. 1994); *Tolbert v U.S.* 916 F. 2d 245, 247 (5th Cir. 1990)

However, Petitioner asserts the Doctrine of Equitable Tolling to pursue her viable claims. Petitioner maintains that she went to an EEO counselor in 1990 to pursue her administrative complaints against the agency and that she followed the procedures given by the EEO counselor. The Respondents never raised the issue of Petitioner's failure to exhaust her administrative remedies until six years after Petitioner's initial EEO Complaint. Petitioner believed that she was correctly told the procedures by the EEO counselor. In fact, Petitioner recently received on June 20, 1997 another written statement from the United States Equal Employment Opportunity Commission that Petitioner had timely initiated her appeal to the EEOC. (See Appendix Pg 108)

The lower court cited in its opinion that the Fifth Circuit acknowledges "three possible bases" for equitable tolling; (a) the pendency of a suit between the same parties in the wrong forum; (2) plaintiff's unawareness of the facts giving rise tot he claim because of the defendant's intentional concealment of them; and (3) the EEOC's misleading the plaintiff about the nature of her rights. " See *Wilson*, 65 F. 3d at 404.

Petitioner relies heavily upon *Munoz v. Aldridge, Sect. Of the U.S. Dept. Of the Air Force*, 894 F. 2d 1489 (5th Cir. 1990). In *Munoz*, the court held in this discrimination lawsuit that the Air Force waived its right to claim that employee's Title VII employment discrimination action was time barred by proceeding with administrative phase of the employee's complaint for four years without objection.

In the case at bar, your Petitioner maintains that Respondent's claim that her action was time barred should be waived since the agency waited a period of over six years before asserting the claim.

Petitioner maintains that she never abandoned the administrative process. She always intended to follow the EEO counsel's directions and then proceed to court. This would explain why the administrative process lasted as long as it did. (1990 - 1996)

The court in *Munoz* further held that the purpose of exhaustion is to give the agency the information it needs to investigate and resolve the dispute between the employee and the employer. *Good faith effort by the employee to cooperate with the agency and EEOC and to provide all relevant, available information is all that exhaustion requires.* See, *Wade v Secretary of the Army*, 796 F.2d 1369, 1377 (11th Cir. 1986)

Finally, Petitioner maintains that if her Title VII complaint was timely filed, then the agency should be equitably estopped from alleging untimeliness. In *Munoz*, the court stated that Manuel Munoz's administrative complaint was allegedly filed late, not his civil complaint. The court in *Munoz* stated that civil actions under 42 U.S.C. Section 2000 e - 16 are actions against the United States, and as such are brought under a statutory waiver of sovereign immunity. Because such waivers are

construed narrowly, this court has held that the limitations period for filing of a civil complaint under this provision of Title VII is jurisdictional. See *Eastland v Tennessee Valley Authority*, 553 F. 2d 364, 365 (5th Cir.); *Bell v Veterans Admin. Hosp.* 826 F.2d 357, 360-61 (5th Cir. 1987); *Hernandez v Aldridge*, 866 F. 2d 800, 802 (5th Circ. 1989). The court in *Munoz* further stated that because timely filing of a complaint in district court is jurisdictional, it is not subject to waiver, estoppel or equitable tolling. But see, *Oaxaca v Roscoe*, 641 F. 2d 386, 380 (5th Circ. 1981) where the court rejected the contention that "by merely accepting and investigating a tardy complaint, (an agency) automatically waives its objection to the complainant's failure to comply with the prescribed time delays."

However, in the case at bar, the Respondent did more than simply accept and investigate Petitioner's complaint. There was a specific finding of timeliness of Petitioner's administrative complaint after six years of investigation.

Therefore, based upon the foregoing, Petitioner respectfully requests this court to reverse and remand her case based upon the Doctrines of Equitable Estoppel and Equitable Tolling.

II. THE DECISION BELOW IS INCONSISTENT WITH *MCDONNELL DOUGLAS CORPORATION VERSUS GREEN*, A UNITED STATES SUPREME COURT DECISION CONCERNING THE IMPORTANT ISSUE OF RACIAL DISCRIMINATION IN THE WORKPLACE.

Plaintiff asserts that the decision below is inconsistent with *McDonnell Douglas Corporation v. Green*, 41 U.S. 792, 802 (1973). Plaintiff must initially establish a prima facie case of discrimination, in the absence of direct proof. Also see, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981). If a prima facie case is established, the Defendants must articulate legitimate non-discriminatory reasons for Plaintiff's termination. *McDonnel Douglas*, supra; *Burdine*, supra. Thereafter, Plaintiff must prove that the reasons advanced by the Defendants are either untrue, or unworthy of belief, as to a pretext to hide,

or mask, discrimination. *McDonnell Douglas*, supra; *Burdine*, supra; and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502,507 (1993); and *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

To establish a prima facie case on the bases of race (African-American), Plaintiff must establish by a preponderance of the evidence, that she: (1) is an African-American; (2) was qualified for her position; (3) was terminated from her position. *McDonnell Douglas*, supra; *Burdine*, supra.

In the case at bar, Petitioner established that she was qualified for her position through her job evaluations.

Petitioner has proven that the reason Respondent gave for terminating her (insubordination) was pretextual in nature since: (1) Petitioner has shown through affidavits that her supervisor had a racial motive in her termination; (2) that Petitioner had filed prior EEO against the agency; (3) that defendants have failed to produce any disciplinary actions taken against Petitioner during her tenure as a Physical Science technician; and (4) where plaintiff has entered into evidence her court record which rebuts the allegation of *insubordination*.

Defendants have not established, by demonstrable evidence, that in the absence of discrimination, Plaintiff would still not have been retained as a Physical Science Technician . See, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Therefore, based upon the foregoing, Plaintiff has established a prima facie case of racial discrimination in the workplace.

CONCLUSION

Based upon the foregoing facts, federal statutes and case law, Petitioner respectfully requests this Honorable Court to receive this Petition for Writ Certiorari, grant a review on the issues presented and issue

an opinion of reversal in accordance to the federal law. Petitioner is certainly aware that this Honorable Court has discretion to determine which cases it will review. Petitioner is not a public figure, famous, or controversial. However, Petitioner is an African-American female who believes in our United States Constitution as well as our judicial system. Petitioner believes justice shouldn't be afforded only to the famous, but to the ordinary hard working citizens of these United States. Plaintiff further believes that ultimate justice *shall* roll down like waters and righteousness like a mighty stream!

Therefore, Petitioner seeks justice for herself and other females desiring to work for Respondent. Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

La Quetta M. Golden,
Counsel of Record
LAW OFFICE OF
LA QUETTA M. GOLDEN
2320 14TH STR., SUITE 206
GULFPORT, MS 39501
(228) 863-3152

Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Connie Brown Derbigny,
Plaintiff - Appellant,

VERSUS

Dan Glickman, Et al.,
Defendants - Appellees.

Case No. 97-60286

ORDER, dated December 31, 1997, Before Duhe', DeMoss, and Dennis, Circuit Judges: Per Curiam:[1]

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[1] Pursuant to 5th Cir. R. 47.5, the Court as determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Appellant Connie Brown Derbigny ("Derbigny") appeals the district court's grant of summary judgment dismsising her Title VII employment discrimination claims. We affirm.

BACKGROUND

Derbigny, a black female, obtained temporary employment at the National Monitoring and Residue Analysis Laboratory ("NMRA") in Gulfport, Mississippi, beginning in March, 1987. She was subsequently promoted to the permanent position of physical science technician. Derbigny resigned in August, 1989, to further her education. In March, 1990, she returned to the NMRA as a physical science technician, but this time as a temporary employee. Her sister, Deborah Brown ("Brown") , also began work at NMRA around that time. Because Derbigny continued to attend school, her work schedule was altered to accommodate her school schedule. Sometime after Derbigny returned to NMRA, Brown began dating a white, male coworker, Darren Ladner, whom she later married.

On October 23, 1990, Derbigny received her annual performance review, which indicated a "fully successful" rating by her supervisor, Dorothy Ladner ("Ladner"), a white female. Derbigny refused to sign the evaluation from because she believed she should have been rated "exceeds" in light of previous comments by Ladner that she was doing outstanding work. For similar reasons, Brown also refused to sign her evaluation form. That same day, Derbigny and Brown met with Joseph Ford, a black male and second-level supervisor, to complain about their performance reviews. Although Ford attempted to explain the evaluations, the meeting grew heated and Ford terminated Brown for insubordination.

Following that incident, Derbigny's relationship with her supervisors and coworkers deteriorated. Over the next three months, Derbigny failed a series of informal grievances with Ford, complaining,

inter alia, about her evaluation and about warning letter from Ladner about her work performance. Finally, during a dispute over Derbigny's use of the copying machine to copy her work folders, Derbigny apparently accused Ladner of lying. Derbigny was subsequently terminated by Ford for insubordination on February 11, 1991.

On September 17, 1991, Derbigny filed an EEO charge of discrimination, alleging that she had been discriminated against in the workplace because of Ladner's disapproval of her sister's interracial marriage. Her charge was denied on the merits in a final agency decision; that decision was upheld by the EEOC. Derbigny then filed suit in federal court under Title VII, 42 U.S.C. Section 2000 e et seq.

The district court granted the Secretary's motion to dismiss claims based on conduct occurring before January 12, 1991, for failure to exhaust administrative remedies. See Pacheco v. Rice, 966 F. 2d 904, 95 (5thCir. 1992); 29 C.R.F. Section 1613.214 (a) (1) (I) (1991). The court also granted the Secretary summary judgment on claims arising from conduct after January 12,1 991, because, even assuming Derbigny had established a prima facie case of employment discrimination, the Secretary provided legitimate, non-discriminatory reasons for the challenged actions. See Long v. Eastfield College, 88 F. 3d 300, 308 (5th Circ. 1996), citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993). Derbigny now appeals.

DISCUSSION

We review the district court's grant of summary judgment de novo. Bodenheimer v. PPG Industries, Inc., 5 F. 3d 955, 956 (5th Cir. 1993). Summary judgment shall be rendered if there is no genuine issue of material fact and if the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). In making that determination, we must draw all justifiable inferences in favor of the nonmovant. Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986). We need not address whether Derbigny failed to exhaust administrative remedies as to some of her claims, because we find that,

even assuming Derbigny has stated a prima facie case[2] of racially motivated employment discrimination, the Secretary has advanced legitimate, non-discrimintory reasons for her termination. See Long, 88 F. 3d at 304-05.

Title VII makes it unlawful for an employer "to discriminate against [] any individual because of his race . . ." 42 U.S.C. Section 2000 e-2(a)(1).

Once a pliantiff makes out a prima facie case of discrimination, the burden shifts to the defendant to articulate "reasons for its actions, which, ifbelieved by thetrier of fact, would support a finding that unlawful discrimination was not a cause of the employment action." Hicks, 509 U.S. at 507. If the defendant caries this burden of production, the plaintiff then must show that the proffered reason is pretextual. Id. at 508, citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248,256 (1981). The plaintiff retains the ultimate burden of proving that he was the victim of intentional discrimination. Hicks, 509 U.S. at 508.

Although we have serious doubts whether Derbigny has established her prima facie case, we need not reach that issue. The record shows that Derbigny's supervisors had legitimate nondiscriminatory reasons for

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[2] A prima facie case of employment discrimination under Title VII requires the plaintiff to show: (1) she is within a protected group; (2) she was adversely affected by her employer's decision; (3) she was qualified to retain her position or otherwise be free of adverse employment decisions leading up to and including her termination; and, (4) "evidence, either circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching its decision." Woodhouse v. Magnolia Hospital, 92 F. 3d 248, 252 (5th Circ. 1996); see Meinecke v H&R Block of Houston,66 F. 3d 77, 83 (5th Cir. 1995)

their actions[3] against Derbigny and were not motivated by racial animus. Derbigny fails to show that her "fully satisfactory" review was based on anything but legitimate, objective workplace standards. Furthermore, Ladner's written warnings to Derbigny appear justifiable, given Derbigny's improper absence from the NMRA compound, her uncooperative attitude, and her stubborn insistence on copying work folders in direct defiance of Ladner's orders. On the whole, the record shows that, following her October evaluation, Derbigny became a disgruntled employee, whose unruly behavior resulted in her dismissal. Finally, the record further shows that Derbigny's supervisors made a good faith, but ultimately fruitless, effort to resolve Derbigny's problems.

In sum, we find that the Secretary articulated legitimate, non-discriminatory reasons for its actions against Derbigny. Furthermore, Derbigny has not pointed to any evidence in the record showing that the proffered reasons for her supervisor's actions were pretextual. Since there is no genuine issue as to whether the NMRA intentionally discriminated against Derbigny, the district court correctly granted the Secretary's motion for summary judgment.

AFFIRMED

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[3] We assume, as did the district court, that Derbigny's performance evaluation, the series of letters warning Derbigny about her work performance, and finally the termination itself all constitute "adverse employment actions" for purposes of Title VII. But see Dollis v. Rubin, 77 F. 3d 777, 781-82 (5th Cir. 1995) (Title VII designed to address ultimate employment decisions and not every decision made by employers that might have some tangential effect on those employment decisions.

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OFMISSISSIPPI
SOUTHERN DIVISION**

Connie Brown Derbigny, - Plaintiff

v.

Dan Glickman, Secretary, et. al. - Defendants

Civil No. 1:96cv180GR

**ORDER, dated March 31, 1997, Walter Gex,
United States District Judge**

This cause is before the Court on motion to dismiss, or in the alternative, for summary judgment [32-1] filed by the defendant, Dan Glickman, Secretary of the United States Department of Agriculture [Secretary]. In accordance with the Court's Memorandum Opinion issued this date, incorporated herein by reference, it is hereby,

ORDERED AND ADJUDGED that the Secretary's motion to dismiss pursuant to Federal Rule of Civil Procedure 12 (b) (6) for lack of subject matter jurisdiction [32-1] be, and is hereby, denied; It is further,

ORDERED AND ADJUDGED that the Secretary's motion to dismiss the plaintiff's Title VII claims based on conduct occurring before January 12, 1991 [32-1], be, and is hereby, granted under Federal Rule of Civil Procedure 56, as required by 29 C.F.R. Section 1613.214 (a)(1)(I), for failure to exhaust administrative remedies, or alternatively, on the merits, It

is further,

ORDERED AND ADJUDGED, that the Secretary's motion to dismiss claims occurring within the limitations period governed section 1613.214(a)(1)(I) [2-1] be, and is hereby granted pursuant to Rule 56. It is further,

ORDERED AND ADJUDGED, that all parties shall bear their respective costs.

SO ORDERED AND ADJUDGED, this the 31st day of March, A.D., 1997

SO ORDERED AND ADJUDGED this the 25th day of July, A.D., 1996.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. BOX 19848
Washington, D.C. 20036

Connie L. Brown Derbigny,	)
Appellant,	)
	)
	)
v.	) Appeal No. 01955049
	) Agency No. 910917
Daniel Glickman,	)
Secretary,	)
Department of Agriculture,	)
Agency.	)

DECISION (STATED IN PART), dated June 20, 1997, Ronnie Blumenthal, Director Office of Federal Operations

Appellant timely initiated an appeal tot he Equal Employment Opportunity Commission (EEOC) from the final agency decision concerning her equal employment opportunity (EEO) complaint, which alleged discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000 e et seq. The appeal is accepted by the Commission in accordance with the provisions of EEOC Order No. 960.001.